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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 NEW EDGE INTERNATIONAL, LLC, a
10 New Jersey Limited Liability Company,

11 Plaintiff,

C08-1552Z

12 v.

ORDER

13 TRANS-NET, INC., a Washington
14 Corporation,

15 Defendant.

16 THIS MATTER comes before the Court on defendant's motion for summary
17 judgment, docket no. 20. Having reviewed all papers filed in support of and in opposition to
18 the motion, the Court GRANTS the motion.

19 **Background**

20 Plaintiff New Edge International, LLC ("NEI") is an exporter; it purchases product in
21 one location, moves it to another location, and resells the product for a profit. Ionitsa Decl.
22 at ¶ 3 (docket no. 24). Defendant Trans-Net, Inc. ("Trans-Net") is a Washington-based
23 company that arranges for the shipment of cargo from the United States to Russia, as well as
24 other countries. Exh. A to Meyler Decl. (docket no. 26). In the fall of 2007, NEI contracted
25 with Trans-Net to ship a container of frozen pork from Seattle to Petropavlovsk-Kamchatsky
26 ("P-K"), Russia. Ogle Decl. at ¶ 2 & Exh. A (docket no. 21); see also Exh. A to Ionitsa

1 Decl. The bill of lading setting forth the agreement between NEI and Trans-Net (the “Trans-
2 Net Bill of Lading”) listed as the consignee for the frozen pork Trading Company Caravan
3 Ltd. (“Caravan”), and it indicated that “[t]he responsibilities of the Carrier in any capacity
4 shall altogether cease and the Goods shall be considered to be delivered and at their own risk
5 and expense in every respect when taken into the custody of Customs or other Authorities.”
6 Bill of Lading Terms & Conditions at ¶ 15, Exh. A to Ogle Decl.; see also Exh. A to Ionitsa
7 Decl. Trans-Net issued three originals of the Trans-Net Bill of Lading and sent them to NEI.
8 Ionitsa Decl. at ¶ 5.

9 The container of pork arrived in P-K on December 27, 2007, aboard a vessel operated
10 by Sakhalin Shipping Company (“SASCO”). Semenov Decl. at ¶ 2 (docket no. 22). SASCO
11 had issued a transit bill of lading for the cargo (the “SASCO Transit Bill”), listing as
12 consignee Transflot for Trading Company Caravan. Exh. D to Meyler Decl. Transflot is a
13 company that served as Trans-Net’s agent in P-K. Semenov Decl. at ¶ 1. When the pork was
14 offloaded, the original SASCO Transit Bill was stamped by Russian customs officials and
15 given to Denis Semenov, an employee of Transflot. Id. at ¶ 3. The container of pork was
16 placed in a bonded storage area controlled by Russian customs officials and P-K Port
17 authorities. Ogle Decl. at ¶ 5; see also Yushkin Report at 3, Exh. A to Yushkin Decl. (docket
18 no. 25). Had all gone according to plan, Caravan, which had contracted with NEI to
19 purchase the pork, would have received from NEI an original Trans-Net Bill of Lading,
20 would have then been able to exchange the Trans-Net Bill of Lading for the original SASCO
21 Transit Bill held by Mr. Semenov of Transflot, and would have used the SASCO Transit Bill,
22 along with an authorization letter from Mr. Semenov, to obtain the container from the
23 warehouse at the P-K Port. See Semenov Decl. at ¶ 4; see also Yushkin Report at 3.

24 The plan, however, went awry. While the container of pork was in route, a dispute
25 arose between NEI and Caravan and, as a result, on December 17, 2007, NEI instructed
26 Trans-Net not to release the pork to Caravan. Ionitsa Decl. at ¶ 7 & Exh. B. The container

1 of pork remained in storage at the P-K Port for almost three months, while NEI attempted to
2 identify another buyer. See Ogle Decl. at ¶ 5; Ionitsa Decl. at ¶ 16. Meanwhile, Trans-Net
3 expressed concerns to NEI about the situation, stating in an e-mail to NEI's sole member and
4 manager, Artem Ionitsa:

5 It seems this matter is not resolving itself as quickly as expected although I am
6 sure you are trying. We are caught in the middle of this dispute between you
7 and your buyer and we fear soon the matter will be taken out of our hands by
8 Russian customs if the cargo is arrested. We highly suggest you take action to
9 move this cargo into bonded cold storage after payment of accrued storage and
10 other destination fees.

11 Exh. C to Ogle Decl. (e-mail dated Feb. 13, 2008); see also Ionitsa Decl. at ¶ 2.

12 Although NEI eventually found another purchaser for the pork, and both Trans-Net
13 and SASCO took steps to issue the documents necessary for the new buyer to take possession
14 of the container, see Exh. A to Larchenko Decl. (docket no. 28); Ionitsa Decl. at ¶ 18, on
15 March 24, 2008, the container of pork was released from the P-K Port warehouse to Caravan
16 without presentation by Caravan of the original, stamped SASCO Transit Bill, see Semenov
17 Decl. at ¶¶ 12-13. At the time Caravan obtained the frozen pork, Caravan had not yet
18 presented to Mr. Semenov an original Trans-Net Bill of Lading and had not received from
19 Mr. Semenov either an authorization letter or the original SASCO Transit Bill. Id. at
20 ¶¶ 10 & 12.

21 In October 2008, NEI initiated this action against Trans-Net, and it now alleges:
22 (i) violation of the Carriage of Goods by Sea Act ("COGSA"); (ii) violation of the Harter
23 Act; (iii) violation of the Pomerene Bills of Lading Act; and (iv) breach of contract. First
24 Amended Complaint (docket no. 9). Trans-Net moves for summary judgment as to all four
25 claims on the ground that, when it delivered the container of pork into the custody of Russian
26 customs and P-K Port officials, it had satisfied its statutory and contractual obligations.

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1 **Discussion**

2 **A. Summary Judgment Standard**

3 The Court should grant summary judgment if no genuine issue of material fact exists
4 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). When
5 a properly supported motion for summary judgment has been presented, the adverse party
6 “may not rely merely on allegations or denials in its own pleading,” but rather must set forth
7 “specific facts” demonstrating the existence of a genuine issue for trial. Fed. R. Civ.
8 P. 56(e)(2). The nonmoving party is entitled to have all “justifiable inferences” favorably
9 drawn. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). When the record,
10 however, taken as a whole, could not lead a rational trier of fact to find for the opposing
11 party, summary judgment is warranted. *See Miller v. Glenn Miller Prods., Inc.*, 454 F.3d
12 975, 988 (9th Cir. 2006); *see also Beard v. Banks*, 548 U.S. 521, 536 (2006).

13 **B. COGSA & The Harter Act**

14 By its own terms, COGSA applies to contracts for the carriage of goods by sea only
15 “from the time when the goods are loaded on to the time when they are discharged from the
16 ship.” COGSA § 1(e), reprinted in Revision Notes following 46 U.S.C. § 30701. In other
17 words, COGSA governs from the time the ship’s tackle is hooked onto the cargo at the port
18 of loading until the time the cargo is released from the tackle at the port of discharge, *i.e.*, the
19 “tackle-to-tackle” period. *See Starrag v. Maersk, Inc.*, 486 F.3d 607, 612 (9th Cir. 2007).
20 COGSA limits a carrier’s liability to \$500 per package unless a higher maximum amount is
21 negotiated between the carrier and the shipper. COGSA § 4(5). Under COGSA, a shipper is
22 presented with the choice of accepting the statutory liability limitation in exchange for a
23 lower rate for shipping or declaring a higher value and paying a higher rate. *Starrag*, 486
24 F.3d at 612.

25 In contrast, the Harter Act prohibits a carrier from inserting into a bill of lading or
26 shipping document a provision avoiding liability relating to “negligence or fault in loading,

1 stowage, custody, care, or proper delivery.” 46 U.S.C. § 30704. This provision of the Harter
2 Act was partially superceded by COGSA, but it still applies outside the tackle-to-tackle
3 period, *i.e.*, prior to loading and during the time between discharge of the cargo and proper
4 delivery. *See Ace Bag & Burlap Co. v. Sea-Land Serv., Inc.*, 40 F. Supp. 2d 233, 236 (D.N.J.
5 1999); *see also Allied Chem. Int’l Corp. v. Companhia de Navegacao Lloyd Brasileiro*, 775
6 F.2d 476, 482 (2d Cir. 1985). Under COGSA, however, the carrier and shipper may agree to
7 extend COGSA’s liability limitation beyond the tackle-to-tackle period, even to the time of
8 delivery, and thereby render the Harter Act inapplicable. COGSA § 7; *see Starrag*, 486 F.3d
9 at 612-13. In this case, the Trans-Net Bill of Lading provided that COGSA “shall be deemed
10 to be incorporated herein” and “shall govern before loading on and after discharge from the
11 vessel and throughout the entire time the Goods are in the custody of the Carrier.” Bill of
12 Lading Terms & Conditions at ¶ 1, Exh. A to Ionitsa Decl. This explicit language nullifies
13 NEI’s Harter Act claim. *Starrag*, 486 F.3d at 615 (when COGSA is contractually extended
14 until delivery, the Harter Act does not apply).

15 In the alternative, even if NEI’s Harter Act claim remained viable, the result would be
16 the same; Trans-Net has not violated either COGSA or the Harter Act. Under both COGSA
17 and the Harter Act, a carrier has a duty to properly deliver the cargo. COGSA § 3(2) (“The
18 carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the
19 goods carried.”); *see* 46 U.S.C. § 30704; *see also Seanto Exports v. United Arab Agencies*,
20 137 F. Supp. 2d 445, 449 (S.D.N.Y. 2001) (“the carrier retains responsibility for the cargo
21 until ‘proper delivery’ has been made”). Neither statute, however, defines in express terms
22 what constitutes proper delivery. Under maritime common law, valid delivery requires that
23 the carrier “give due and reasonable notice to the consignee, so as to afford him a fair
24 opportunity of providing suitable means to remove the goods, or put them under proper care
25 and custody.” *Starrag*, 486 F.3d at 617 (quoting *Richardson v. Goddard*, 64 U.S. 28, 39
26 (1859)). Under COGSA, delivery has been similarly defined to occur when the consignee is

1 notified that the goods have arrived and has been given a reasonable opportunity to obtain or
2 inspect the goods. *Id.* at 617 & n.10. In contrast, under the Harter Act, merely discharging
3 the cargo “upon a fit and customary wharf” has been deemed sufficient delivery. *Ace Bag*,
4 40 F. Supp. 2d at 237 (citing *Morse Electro Prods. Corp. v. S.S. Great Peace*, 437 F. Supp.
5 474, 486 (D.N.J. 1977), and *Allstate Ins. Co. v. Imparca Lines*, 646 F.2d 166, 168 (5th Cir.
6 1981)).

7 Whether delivery is proper must also be evaluated according to the custom and usage
8 of the port of discharge. *See Ace Bag*, 40 F. Supp. 2d at 237; *see also Servicios-Expoarma,*
9 *C.A. v. Indus. Mar. Carriers, Inc.*, 135 F.3d 984, 993 (5th Cir. 1998); *Tan Hi v. United*
10 *States*, 94 F. Supp. 432, 435 (N.D. Cal. 1950) (“delivery must be according to the custom and
11 usage of the port, and such delivery will discharge the carrier of his responsibility”; common
12 law does not “permit less nor require more in the way of delivery than the usage or law of the
13 port dictate[s]”). In this case, the parties agree that the custom and usage of the P-K Port
14 required placement of the container of frozen pork in a bonded storage area, from which the
15 consignee could claim the goods upon presentation of the original, customs-stamped SASCO
16 Transit Bill. *See* Yushkin Report at 3; *see also* Semenov Decl. at ¶¶ 2-4. The parties dispute,
17 however, whether Trans-Net continued to bear responsibility for the container after it was
18 secured in the warehouse controlled by Russian customs and P-K Port officials.

19 The Court concludes that Trans-Net effected proper delivery when it relinquished to
20 Russian authorities custody over the container of pork. In this case, Trans-Net was given
21 explicit instructions not to deliver the cargo to the consignee, Caravan. It complied with this
22 direction, and it notified the shipper and owner, NEI, about the container’s whereabouts,
23 expressly warned NEI about the risks of leaving the cargo in the storage facility at the
24 P-K Port, and took the steps necessary to enable NEI’s new buyer to obtain the pork.
25 Moreover, the record before the Court establishes that neither Trans-Net nor its agent,
26 Transflot, gave Caravan the documents usually required to retrieve cargo from the warehouse

1 controlled by Russian officials.¹ Thus, to the extent Caravan improperly obtained the
2 container of pork,² the fault lies not with Trans-Net, but with the Russian storage attendants³
3 or perhaps NEI, which was provided notice and ample opportunity to remove the cargo and
4 place it under proper care. The Court HOLDS as a matter of law that Trans-Net satisfied its
5 delivery obligations under COGSA, as well as under the Harter Act, if applicable, and
6 GRANTS summary judgment in favor of Trans-Net as to NEI's COGSA and Harter Act
7 claims, and DISMISSES NEI's first and second causes of action with prejudice.

8 **C. The Pomerene Bills of Lading Act**

9 The Court also HOLDS as a matter of law that Trans-Net fulfilled its delivery
10 obligations under the Pomerene Bills of Lading Act. Under this Act, a carrier may deliver

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12 ¹ Thus, this case is distinguishable from the cases cited by NEI. For example, in *Allied*, the carrier was held
13 liable for misdelivery because it issued to the consignee a "carta declaratoria," which allowed the consignee
14 to obtain the cargo from a warehouse controlled by the Administration of the Port of Salvador, an agency of
15 the Brazilian government, without producing the original bill of lading and without having paid for the goods.
16 775 F.2d at 479-80. Likewise, in *Int'l Harvester*, the carrier was held liable for misdelivery when its agent
17 issued a delivery order to the consignee without obtaining in exchange the original bill of lading, thereby
18 assuming the risk that the consignee had not paid, and would not pay, for the goods. 695 F. Supp. at 737,
19 739.

20 ² Caravan apparently paid for the container of frozen pork shipped to P-K, but was in arrears as to other
21 transactions with NEI as to which Trans-Net had not been involved. *See* Semenov Decl. at ¶ 7 & Exh. B.

22 ³ NEI's experts assert that, because Trans-Net was instructed to modify the shipping documents to replace I.P.
23 Ushtykov V.A. as consignee, and because the frozen pork was released to an entity other than the substituted
24 consignee, Trans-Net must have failed to make the requested corrections or provide the revised shipping
25 documents to Russian officials, and therefore caused NEI's injury. *See* Yushkin Report at 4. This conclusion
26 is flawed for three reasons. First, it completely ignores the possibility that Russian authorities did not, in this
case, follow their own protocol. Second, it disregards the undisputed evidence that SASCO issued a
Correction Advice to supplement the SASCO Transit Bill, that Trans-Net issued an amended Trans-Net Bill
of Lading showing I.P. Ushtykov V.A. as consignee, and that the revised Trans-Net Bill of Lading was
forwarded by NEI to the new consignee. *See* Larchenko Decl. at ¶ 4 & Exh. A; Ionitsa Decl. at ¶ 18. Third, it
contradicts the undisputed custom and usage of the P-K Port. As indicated in the record, only one original
SASCO Transit Bill existed, and the SASCO Transit Bill could only be released by Mr. Semenov in exchange
for an original Trans-Net Bill of Lading, which only a legitimate consignee would possess. Thus, contrary to
the experts' conclusion, the SASCO Transit Bill could not also be revised and given to Russian officials as
evidence or notification of the correct consignee. Finally, to the extent NEI or its experts assert that Trans-
Net was required to inform Russian customs or P-K Port officials about a change in consignee, they fail to
cite any provision of U.S. or Russian law for support. Although Article 149 of the Merchant Shipping Code
of the Russian Federation, to which NEI's experts refer, allows a consignor to change the consignee prior to
delivery and to dictate the disposition of the cargo, it imposes no duty on the carrier to advise governmental
authorities about any such modifications. *See* Exh. 1 to Yushkin Report.

1 goods covered by a bill of lading to (1) a person entitled to their possession, (2) the
2 consignee named in a nonnegotiable bill, or (3) a person in possession of a negotiable bill if
3 the goods are deliverable to the order of that person or the bill has been indorsed to that
4 person or in blank. 49 U.S.C. § 80110(b). For purposes of the Act, customs authorities are
5 persons entitled to possession of such goods. Ace Bag, 40 F. Supp. 2d at 240. Thus, in
6 turning the container of frozen pork over to Russian customs officials, Trans-Net complied
7 with the statute. The Court GRANTS summary judgment in favor of Trans-Net as to NEI's
8 claim under the Pomerene Bills of Lading Act, and DISMISSES NEI's third cause of action
9 with prejudice.

10 **D. Breach of Contract**

11 The Court further HOLDS as a matter of law that Trans-Net fulfilled its contractual
12 obligations under the Trans-Net Bill of Lading by delivering the container of pork into the
13 custody of Russian officials. See Bill of Lading Terms & Conditions at ¶ 15, Exh. A to Ogle
14 Decl. NEI has not identified any provision of the Trans-Net Bill of Lading that it asserts
15 Trans-Net has breached. Indeed, NEI asserts that the Trans-Net Bill of Lading does not
16 apply to the transaction at issue because, by its own terms, it governs only multi-modal
17 transportation, which was not used in this case. See Response at 16 (docket no. 23); see also
18 Exh. A to Ionitsa Decl. The Court interprets NEI's argument as a concession that it has no
19 valid breach of contract claim.

20 Instead, NEI now appears to pursue a promissory estoppel theory, discussing at length
21 Trans-Net's alleged representations about its expertise and NEI's reliance thereon. See
22 Response at 12-14. NEI, however, did not plead promissory estoppel, see Amended
23 Complaint, and its failure to assert such theory in a timely manner precludes its current
24 arguments. Even if NEI could raise such claim, the Court is persuaded that NEI could not
25 prevail. To prove promissory estoppel, NEI must establish that Trans-Net made a promise,
26 upon which it reasonably expected NEI to rely, and upon which NEI did justifiably rely in

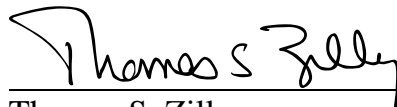
1 such manner that injustice can be avoided only by enforcement of the promise. Uznay v.
2 Bevis, 139 Wn. App. 359, 369-70, 161 P.3d 1040 (2007). Although NEI describes a number
3 of representations made on Trans-Net's website, it identifies no specific promise made by
4 Trans-Net regarding the container of pork at issue. To the contrary, the record indicates that
5 Trans-Net disclaimed any ability to protect the container, warning that the matter might "be
6 taken out of our hands by Russian customs if the cargo is arrested" and strongly suggesting
7 to NEI that it "take action." Exh. C to Ogle Decl. Moreover, any reliance NEI might have
8 placed on Trans-Net in light of the circumstances was not, as a matter of law, justified. The
9 Court GRANTS summary judgment in favor of Trans-Net as to NEI's breach of contract
10 claim, as well as NEI's unpleaded promissory estoppel claim, and DISMISSES NEI's fourth
11 cause of action with prejudice.

12 **Conclusion**

13 For the foregoing reasons, defendant Trans-Net, Inc.'s motion for summary judgment
14 is GRANTED, and plaintiff New Edge International, LLC's claims are DISMISSED with
15 prejudice. The Clerk is directed to enter judgment accordingly and to send a copy of this
16 Order to all counsel of record.

17 IT IS SO ORDERED.

18 DATED this 28th day of December, 2009.

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22 Thomas S. Zilly
23 United States District Judge
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